NO. 22615

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM NEIL TURNBULL,	)
	)
Plaintiff-Appellant,	)
	)
vs.	)
	)
JOSEPHINE BONKOWSKI & LEONARD KING,	)
	)
Defendants-Appellees.	)

REPLY BRIEF OF PLAINTIFF-APPELLANT

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REPLY BRIEF

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Computation of time: "The time in which an act provided by law is required to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded." (Title I, Alaska Statutes, Article I, Section 10; also cited as Section 01.10.080)..... 2,5

Applicability of Common Law: "So much of the common law not inconsistent with the Constitution of the State of Alaska or the Constitution of the United States or with any law passed by the Legislature of the State of Alaska is the rule of decision in this state." (Title I, Alaska Statutes, Article I, Section 10; also cited as Section 01.10.010)..... 3

Applicability of Act: "The provisions of this Act shall be observed in the construction of the laws of the state unless such construction would be inconsistent with the manifest intent of the legislature." (Chapter 62, Section 1, Laws of Alaska)..... 4

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REPLY BRIEF OF
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I. STATUTORY DIRECTION CONTROLS THE COMPUTATION OF TIME.

Contrary to the statutory directions cited by Plaintiff-Appellant, Defendants-Appellees assert that a common law exception should prevail in determining the time elapsed in computing a person's age (Br. pp.1-4). However, Defendants-Appellees concede that, in all other cases of time computations, the statutory directions cited by Plaintiff-Appellant would, and should, apply (Br. pp.4,5).

Accordingly, the issue in this case is essentially a narrow one: should a single exception be permitted to exist

for computing the lapse of time constituting a person's age in opposition to a statutory direction as to the method for time elapse computation?

Plaintiff-Appellant submits that there should be no such exception in view of the statutes enacted by the Alaska Legislature. Defendants-Appellees have completely ignored said directions in their urging of an exception, as will more fully appear herein.

II. THERE ARE NO COMMON LAW EXCEPTIONS TO THE STATUTORY DIRECTION FOR COMPUTATION OF TIME IN ALASKA.

Defendants-Appellees' responses, or lack thereof, to the application of the statutory directions, as cited by Plaintiff-Appellant, are as follows:

1. The computation of time is directed by statute:

> "The time in which an act provided by law is required to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded." (Title I, Alaska Statutes, Article I, Section 10; also cited as Section 01.10.080).

Defendants-Appellees admit this, but assert that this statute has no bearing on the "common law rule regarding age" (Br. p.4).

2. The applicability of common law in Alaska is directed by statute:

> Applicability of Common Law: "So much of the common law not inconsistent with the Constitution of the State of Alaska or the Constitution of the United States or with any law passed by the Legislature of the State of Alaska is the rule of decision in this state." (Title I, Alaska Statutes, Article I, Section 10; also cited as Section 01.10.010).(Emphasis added).

Defendants-Appellees made no response to said statute as related in Appellant's brief, pages 12-13; and they offered neither explanation nor reason for ignoring said direction in their urging of a "common law exception".

3. The decision in Wade v. Dworkin, 1965, Alaska, 407 P. 2d 587, dealt with the exact question of the applicability of a suggested common law interpretation in the face of legislative intent; wherein the Alaska Supreme Court was presented with various common law holdings on the issue of whether an intervening Sunday was to be included in interpreting the "computation of time statute".

Defendants-Appellees made no response to, and ignored, said decision as related in Plaintiff-Appellant's

brief, pages 12-14; and they offered no explanation as to why said decision, holding the "common law" inapplicable in view of statutory direction, should not control the case at bar.

4. Courts are enjoined by the legislature to observe the statutory direction as to "computation of time" by a further statutory enactment:

> Applicability of Act: "The provisions of this Act shall be observed in the construction of the laws of the state unless such construction would be inconsistent with the manifest intent of the legislature." (Chapter 62, Section 1, Laws of Alaska).

No response was made by Defendants-Appellees to said statute as related at page 13 of Plaintiff-Appellant's brief and recited in the Wade decision.

The decision in Nelson v. Sandkamp is contrary to Alaska law.

As initially pointed out in Plaintiff-Appellant's brief, pages 10-14, the statutory direction in Alaska pertaining to the applicability of the common law in Alaska and the Wade decision indicate that to apply the dicta in the Minnesota Nelson case would be inconsistent to the ascertainable "manifest intent of the legislature" of the State of Alaska.

Having ignored the statutes and the relevancy of the Wade case as cited by the Plaintiff-Appellant, and making no response thereto in their brief, Defendants-Appellees assert the Nelson dicta but do not comment on the distinctions thereto as related in Plaintiff-Appellant's brief, pages 12-14.

III. THE RULING URGED BY PLAINTIFF-APPELLANT PROVIDES UNIFORMITY IN THE LAW.

Recognizing the statute stating how time is to be computed (01.10.080 Alaska Statutes), but ignoring the statutes controlling the application of the contents of same, the Defendants-Appellees urge that 19 years of "time" should be computed differently than 2 years of "time" (as relates, for example, to the limitation for commencing an action) (Br. p.7). This argument by Defendants-Appellees concedes the contention by Plaintiff-Appellant that the ruling urged by him provides uniformity in the law.

The semantics endorsed by Defendants-Appellees as to "events", "acts" and "doings", to reach a strained "exception" as to the computation of the lapse of time

from a "happening", an "event", a "birth" or any other "occurrence" (Br. p.7), should be dismissed; and the passage of time should be computed uniformly, in all instances, by virtue of the statutory directions aforesaid.

IV. DEFENDANTS-APPELLEES' CITATIONS DISTINGUISHED.

The argument by Defendants-Appellees that "some jurisdictions" include "the first day after a period of disability" is completely irrelevant to the case at bar, and serves only as an attempt to cloud the issue.

Again ignoring the statutory direction in Alaska, Defendants-Appellees "suggest" an additional one day shortening in the computation of the time in which suit could be commenced (Br. pp.7 and 8). By Defendants-Appellees' own admission (Br. p.8, lines 11 and 12), such a method of shortening "may not be considered applicable"; and, of course, it is not relevant to the case at bar in view of the "computation of time" statute in Alaska (20A.L.R. 2d, 1255).

The A.L.R. annotation by Defendants-Appellees and the cases cited in support of said "suggestion" apply only in the absence of a statutory direction as to the method of computing time. In fact, this "suggestion" is

clearly recognized as a "minority" view; for the same annotation, at page 1250, recognizes the general rule (in the absence of a statute relating to time computation) that the first day is to be excluded.

The only purpose served by the aforesaid "suggestion" is to further support Plaintiff-Appellant's position that the ruling urged by him provides uniformity in the law.

The difficulties that could arise in the absence of a uniform application of time computation rules are reflected in the decision of the District Court for the Northern District of Texas, cited by Defendants-Appellees, (Br. p.8), "A year must be counted, not from the day of birth, but from the preceding day when the limitation is figured", Taylor v. Aetna Life Ins. Co., N. D. Texas, 1943, 49 F. Supp. 990, 991. There was no statutory direction in Texas; and, obviously, the statutes in Alaska would compel an opposite result in computing time.

Likewise, the Illinois Appellate Court decision cited by Defendants-Appellees, (Br. p.4), People ex rel Powell v. Board of Education, 1951, 343 Ill. App. 382, 99 N.E. 2d 592, did not involve a statutory interpretation; in fact, the decision clearly states "...what is here involved is an

administrative rule". (99 N.E. 2d 592, 594 and emphasis added.) This case involved a review by a teacher of a ruling by the Chicago Board of Education through a mandamus action where she sought to be restored to her teaching assignment. The court held that the Board of Education's rules as to when school semesters ended and when one attains retirement age applied.

Finally, Defendants-Appellees assert a "deep entrenchment" in the law of a common law method of determining a person's age; but Defendants-Appellees ignore the effect of the statutory directions and enactments, and make no response to Plaintiff-Appellant's request for uniformity.

Plaintiff-Appellant disputes Defendants-Appellees' assertion of such "deep entrenchment", and submits that, for every purpose known to mankind, the passage of time should be computed by excluding the first day of the happening and including the last. The result is the one directed by the Alaska statutes and results in uniformity.

Parenthetically, the purpose of the Statute of Limitationsto prevent stale claims is not thwarted by the ruling urged by Plaintiff-Appellant; and, obviously, there is neither inconvenience nor injury by such a holding

to the Defendants-Appellees. On the other hand, a decision upholding the lower court ruling, deprives Plaintiff-Appellant of an opportunity to pursue his claim for a serious injury.

CONCLUSION

Plaintiff-Appellant pleads for uniformity in computing time and submits that the Wade vs. Dworkin decision, dealing with the exact "computation of time" statute as in the case at bar, logically indicates that there should be no common law exceptions contrary to the statutory directions.

The judgment appealed from should be reversed and the case remanded.

Respectfully submitted,

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I certify that, in connection with the preparation of this Reply Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Vincent J. Biskupic

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